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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 Erik Knutson, Individually and on
13 Behalf of All Others Similarly
14 Situated individually and on behalf
15 of others similarly situated

16 Plaintiffs,
17 v.

18 Sirius XM Radio Inc.

19 Defendant.

20 **Case No.: '12CV0418 AJB NLS**

21 **CLASS ACTION COMPLAINT
FOR DAMAGES**

22 **Jury Trial Demanded**

INTRODUCTION

1. Erik Knutson (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Sirius XM Radio Inc. (“Sirius”), in negligently, and/or willfully contacting Plaintiff through a marketing messages on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

JURISDICTION AND VENUE

2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks up to \$1,500 in damages for each call in violation of the TCPA, which, when aggregated among a proposed class number in the tens of thousands, exceeds the \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff alleges a national class, which will result in at least one class member belonging to a different state than that of Sirius, providing jurisdiction under 28 U.S.C. Section 1332(d)(2)(A). Therefore, both elements of diversity jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.
3. Venue is proper in the United States District Court for the Southern District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because the events giving rise to Plaintiff’s causes of action against Sirius occurred within the State of California and the County of San Diego, within this judicial district.

PARTIES

4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of California. Plaintiff is, and at all times mentioned herein was a, “person” as defined by 47 U.S.C. § 153 (10).
5. Plaintiff is informed and believes, and thereon alleges, that Sirius is, and at all times mentioned herein was, a corporation whose primary corporate address is in New York, New York, and Sirius is therefore a citizen of New York for diversity purposes. Sirius is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10). Sirius provides various consumer credit products and advertises those products through the use of telephone calls. Plaintiff alleges that at all times relevant herein Sirius conducted business in the State of California and in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

6. At all times relevant, Plaintiff was a citizen of the State of California. Plaintiff is, and at all times mentioned herein was, “persons” as defined by 47 U.S.C. § 153 (10).
7. Sirius is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10).
8. At all times relevant Sirius conducted business in the State of California and in the County of San Diego, within this judicial district.
9. Plaintiff, on or before November 12, 2011, purchased a Toyota Tacoma truck which, for marketing purposes, includes a “free” three month trial subscription to Sirius XM Radio.
10. At no time did Plaintiff ever provide his current cellular telephone to Defendant through any medium.
11. At no time did Plaintiff ever enter into a business relationship with Defendant.

12. At no time did Plaintiff ever submit a credit application to Defendant for the
1 extension of credit.
13. Subsequently, Sirius obtained Plaintiff's contact information through
4 unknown means.
14. On or about January 27, 2012 Defendant contacted Plaintiff on Plaintiff's
6 cellular telephone via an "automatic telephone dialing system," ("ATDS") as
7 defined by 47 U.S.C. § 227 (a)(1) using an "artificial or prerecorded voice" as
8 prohibited by 47 U.S.C. § 227 (b)(1)(A).
15. Subsequently, on or about January 30, 2012 at or around 8:30 PM Defendant
10 contacted Plaintiff on Plaintiff's cellular telephone via an ATDS.
16. This ATDS has the capacity to store or produce telephone numbers to be
12 called, using a random or sequential number generator.
17. The telephone number Sirius called was assigned to a cellular telephone
14 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
15 U.S.C. § 227 (b)(1).
18. These telephone calls constituted calls that were not for emergency purposes
17 as defined by 47 U.S.C. § 227 (b)(1)(A)(i).
19. To date, Plaintiff has received a total of three phone calls where it takes at
19 least a minute for an agent of Sirius to pick up the other end of the line
20 because Sirius is using an ATDS.

21 CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action on behalf of himself and on behalf of and all others
23 similarly situated ("the Class").
21. Plaintiff represents, and is a member of the Class, consisting of all persons
25 within the United States who received unsolicited marketing and artificial or
26 prerecorded voice messages from Sirius which message by Sirius or its agents
27 was not made for emergency purposes or with the recipient's prior express
28 consent, within the four years prior to the filing of this Complaint.

- 1 22. Sirius and its employees or agents are excluded from the Class. Plaintiff does
- 2 not know the number of members in the Class, but believes the Class
- 3 members number in the hundreds of thousands, if not more. Thus, this matter
- 4 should be certified as a Class action to assist in the expeditious litigation of
- 5 this matter.
- 6 23. Plaintiff and members of the Class were harmed by the acts of Sirius in at
- 7 least the following ways: Sirius, either directly or through its agents, illegally
- 8 contacted Plaintiff and the Class members via their cellular telephones by
- 9 using marketing and artificial or prerecorded voice messages, thereby causing
- 10 Plaintiff and the Class members to incur certain cellular telephone charges or
- 11 reduce cellular telephone time for which Plaintiff and the Class members
- 12 previously paid, and invading the privacy of said Plaintiff and the Class
- 13 members. Plaintiff and the Class members were damaged thereby.
- 14 24. This suit seeks only damages and injunctive relief for recovery of economic
- 15 injury on behalf of the Class and it expressly is not intended to request any
- 16 recovery for personal injury and claims related thereto. Plaintiff reserves the
- 17 right to expand the Class definition to seek recovery on behalf of additional
- 18 persons as warranted as facts are learned in further investigation and
- 19 discovery.
- 20 25. The joinder of the Class members is impractical and the disposition of their
- 21 claims in the Class action will provide substantial benefits both to the parties
- 22 and to the court. The Class can be identified through Sirius' records or
- 23 Sirius' agents' records.
- 24 26. There is a well-defined community of interest in the questions of law and fact
- 25 involved affecting the parties to be represented. The questions of law and fact
- 26 to the Class predominate over questions which may affect individual Class
- 27 members, including the following:

1 (i) Whether, within the four years prior to the filing of this Complaint,
2 Sirius or its agents sent any marketing and artificial or prerecorded
3 voice messages to the Class (other than a message made for emergency
4 purposes or made with the prior express consent of the called party) to
5 a Class member using any automatic telephone dialing and/or SMS
6 texting system to any telephone number assigned to a cellular
7 telephone service;

8 (ii) Whether Plaintiff and the Class members were damaged thereby, and
9 the extent of damages for such violation; and

10 (iii) Whether Sirius and its agents should be enjoined from engaging in
11 such conduct in the future.

12 27. As a person that received at least one marketing and artificial or prerecorded
13 voice message without Plaintiff's prior express consent, Plaintiff is asserting
14 claims that are typical of the Class. Plaintiff will fairly and adequately
15 represent and protect the interests of the Class in that Plaintiff has no interests
16 antagonistic to any member of the Class.

17 28. Plaintiff and the members of the Class have all suffered irreparable harm as a
18 result of the Sirius' unlawful and wrongful conduct. Absent a class action, the
19 Class will continue to face the potential for irreparable harm. In addition,
20 these violations of law will be allowed to proceed without remedy and Sirius
21 will likely continue such illegal conduct. Because of the size of the individual
22 Class member's claims, few, if any, Class members could afford to seek legal
23 redress for the wrongs complained of herein.

24 29. Plaintiff has retained counsel experienced in handling class action claims and
25 claims involving violations of the Telephone Consumer Protection Act.

26 30. A class action is a superior method for the fair and efficient adjudication of
27 this controversy. Class-wide damages are essential to induce Sirius to comply
28 with federal and California law. The interest of Class members in

1 individually controlling the prosecution of separate claims against Sirius is
2 small because the maximum statutory damages in an individual action for
3 violation of privacy are minimal. Management of these claims is likely to
4 present significantly fewer difficulties than those presented in many class
5 claims.

6 31. Sirius has acted on grounds generally applicable to the Class, thereby making
7 appropriate final injunctive relief and corresponding declaratory relief with
8 respect to the Class as a whole.

9 **FIRST CAUSE OF ACTION**

10 **NEGLIGENT VIOLATIONS OF THE**
11 **TELEPHONE CONSUMER PROTECTION ACT**

12 **47 U.S.C. § 227 ET SEQ.**

13 32. Plaintiff incorporates by reference all of the above paragraphs of this
14 Complaint as though fully stated herein.

15 33. The foregoing acts and omissions of Sirius and its agents constitute numerous
16 and multiple negligent violations of the TCPA, including but not limited to
17 each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

18 34. As a result of Sirius', and Sirius' agents', negligent violations of 47 U.S.C. §
19 227 et seq, Plaintiff and the Class are entitled to an award of \$500.00 in
20 statutory damages, for each and every violation, pursuant to 47 U.S.C. §
21 227(b)(3)(B).

22 35. Plaintiff and the Class are also entitled to and seek injunctive relief
23 prohibiting such conduct in the future.

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SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

36. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
37. The foregoing acts and omissions of Sirius' constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
38. As a result of Sirius' knowing and/or willful violations of 47 U.S.C. § 227 et seq., Plaintiff and each of the The Classes are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
39. Plaintiff and the The Classes are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

40. Wherefore, Plaintiff respectfully requests the Court grant Plaintiffs and the Class members the following relief against Sirius:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Sirius' and Sirius' agents' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiff seeks injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION
OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Sirius' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class and Subclass member treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

TRIAL BY JURY

41. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiffs are entitled to, and demand, a trial by jury.

Date: February 14, 2012

HYDE & SWIGART

By: /s Joshua B. Swigart
Joshua B. Swigart

Date: February 14, 2012

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